No. 92696-4

SUPREME COURT OF WASHINGTON

TIMOTHY WHITE

Petitioner,

vs.

CLARK COUNTY

Respondent.

APPELLANT'S ~~PETITIONER'S~~ OPENING BRIEF

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Appellant/Petitioner Timothy White (hereafter "Plaintiff") respectfully submits this Opening Brief in support of his appeal of the Clark County Superior Court's ruling denying relief under the Public Records Act.

I. ASSIGNMENTS OF ERROR

1. The Superior Court erred in denying Plaintiff's requested relief, where no Public Records Act exemptions exist for the documents Plaintiff requested more than a year following election tabulation and certification, and after expiration of the 60-day retention period of RCW 29A.60.110.

2. In the alternative, the Superior Court erred in denying Plaintiff's requested relief where redaction of the requested documents would remove any exempted information.

3. In the alternative, the Superior Court erred in denying Plaintiff's requested relief where any applicable Public Records Act exemptions are unnecessary to protect any individual's privacy or any vital government interest two years after the election was certified.

II. STATEMENT OF THE ISSUES

1. Did Clark County ("County") violate the PRA by refusing to produce election records that would facilitate an analysis of election-system accuracy and security, where the Legislature had not exempted such records from the Act and where the County refused to even analyze the records or use redaction to facilitate public access?

2. Must the County produce the anonymous records because public access to election records furthers the public interest in a well-functioning democracy and would not irreparably damage any person's privacy or a vital government interest two years after the election?

3. Did the County err in withholding the records purportedly to protect ballot secrecy, even though on identical facts Division Two previously found the County "provided no evidence that production of the ballot images White requested would compromise voter secrecy."

4. Is Plaintiff a prevailing party, entitling him to recovery of his reasonable attorney fees and costs, and should the County pay daily penalties for violating the Act?

III. STATEMENT OF THE CASE

This is an appeal from a ruling of the Clark County Superior Court which denied Plaintiff's Public Records Act ("PRA" or the "Act") action. Plaintiff's suit sought to compel production of anonymous election records which Plaintiff requested under the Act, recovery of reasonable attorneys' fees and costs, and the imposition of a daily penalty for Clark County's PRA violations. Plaintiff contends that the public records he requested in July 2015, including digital images of ballots cast in the November 2013 election and the underlying paper ballots, among others, are not exempt under the PRA, and that the County is compelled by law to provide public access to them.

This appeal relates to a prior records request and appeal to Division Two, which dealt with many of the same November 2013 election records at issue here. *See* White v. Clark County, 188 Wn. App. 622, 354 P.3d 38 (Div. 2 2015), *cert denied*, 2016 Wash. LEXIS 340

(2016) (hereafter "companion case").[1] The primary difference distinguishing this case from the others is the timing of the request. Here, Plaintiff "refreshed" his PRA request after the purported PRA exemptions expired—over one year following election tabulation and certification and the expiration of the 60-day retention period of RCW 29A.60.110.[2] In the companion case, Plaintiff had issued his request one day after the November 2013 election, before tabulation and certification. Clark, 188 Wn. App. at 627-28. As amicus curiae in the companion case, the Washington Coalition for Open Government (WCOG) explained that following 29A.60.110's mandated retention period of 60 days, ballots are not categorically exempt from production and must be produced. *See* Clerk's Papers ("CP") 474-76. Division Two declined to address this question, but acknowledged RCW 29A.60.110 is "limited in scope." Clark, 188 Wn. App. at 633-37, *id.* at 637, n. 6. (examining the statutory regulation of ballot-handling only from the time a ballot is cast until 60-days after tabulation, suggesting limitations might be temporal and change after that time).

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[1] *See also* White v. Skagit County, 188 Wn. App. 886, 355 P.3d 1178 (Div. 1 2015), *cert denied*, 2016 Wash. LEXIS 341 (2016).

[2] "Immediately after their tabulation, all ballots counted at a ballot counting center must be sealed in containers that identify the primary or election and be retained for at least sixty days..." RCW 29A.60.110.

The Washington State Bar Association's Public Records Act Deskbook recommends that requesters make "refresher" requests precisely to target "newly non-exempt documents." Sargent v. Seattle Police Dept., 260 P.3d 1006, 1011-12 (Div. 1 2011) (citing Deskbook), *rev'd in part*, Sargent, 314 P.3d 1093, 179 Wn.2d 376 (2013). The timing of Plaintiff's now-"refreshed" PRA request is fundamentally different from his prior requests. Plaintiff made the request at issue here on July 2, 2015, over one year after voting concluded, after all ballots were tabulated, after the election was certified, and after the 60-day retention period of RCW 29A.60.110 had ended. CP 13, ¶ 2; CP 16-17. None of the County's or the court's proffered justifications for withholding anonymous ballot images have merit at this point in time.

Mr. White is a longtime open-elections advocate. CP 275-77. Mr. White understands that openness in the election process is a public good, encourages citizen involvement, and provides oversight against error, fraud, and abuse. *Id.* Concerned about the efficacy of the computerized ballot-tabulation systems that determine election results across our state, Mr. White made his request for the anonymous records to enable academics, the press, and the public to verify these computer systems' accuracy. CP 16-17 (requesting county-created digital image-files of

scanned paper ballots and the anonymous ballots themselves, among others).

As in all Washington counties, Clark County conducts its elections predominantly by mail. CP 239 at lines 8-13. Clark County voters typically receive blank paper ballots in the mail, record their preferences, and mail the marked ballot back to the County. *Id.* Once received, the County scans the ballots with an "off the shelf" commercial scanner (CP 416), which digitally images the paper ballots for storage as digital files for later use with Hart Intercivic, Inc. verification and tabulation software.[3] CP 239 at lines 2-3, 19-20; CP 240 at lines 6-8; *see also* Clark, 188 Wn. App. at 628-29. The Hart Intercivic, Inc. system counts the votes that are displayed on the digital scans with an automated process that determines the outcome of elections. CP 240 at lines 05-09.

The electronic ballot images are different from the cast paper ballots, which according to statute, must remain secured in case of a recount and are stored in a sealed ballot box until 60-days after tabulation. CP 240 at lines 20-23; RCW 29A.60.110. Election officials need not handle the paper ballots to use the digital images to examine questionable

[3] Many other counties in Washington also use the Hart Intercivic, Inc. system, including Skagit and Island counties. *See e.g.* CP 407 at line 3.

marks for voter-intent,[4] to tabulate votes, or to canvass the election. *Id.*; Clark, 188 Wn. App. at 628, n. 2; *see also* CP 430-32, 438, 443.

At all times, the County maintains the ability to print copies of the ballot-image files, and can save them as PDFs or Microsoft Word documents without touching the paper ballots. CP 409 at lines 17-20; *see also* CP 439. While the County tries to obfuscate the issue, there is a real difference between the paper ballots and the images the County creates and uses with tabulation software. The image files are mere scans of the originals—like many of us deal with every day. Once scanned, the original can be filed or sealed, while the electronic copy is stored on a computer and can be viewed or reprinted. *Id.* Notably, Division Two already found on identical facts that the County "provided no evidence that production of the ballot images White requested would compromise voter secrecy." Clark, 354 P.3d at 42.

Plaintiff issued his request for anonymous election records from the November 5, 2013 General Election on July 2, 2015. CP 16-17. The County produced some records, but did not produce any copies of any

[4] This is known as the "ballot resolve" process, which allows election officials and public observers to view images of ballots that contain markings that the tabulating software program cannot interpret, but from which a human viewing the image could understand the intent of the voter (i.e. a circle around a candidate's name instead of a filled-in box next to is, among other examples). *See* CP 239-240 at lines 2:25-3:04

ballot or ballot image. CP 14, ¶¶ 3-4. The County never even examined the withheld ballots and ballot images for exempt information. *See* CP 20.

On October 13, 2015, Plaintiff commenced a PRA case to compel the County to provide copies of the withheld records. *See* CP 1-5. In withholding the requested ballots and ballot-image files, the County cited no authority specifically exempting the records from public access at this point in time—almost two years after tabulation and certification were completed and the expiration of the statutory retention period. CP 20; RCW 29A.60.110. The County instead asked the court to imply a new exemption from the Constitution, broad election regulations of Title 29A RCW, and administrative code, despite "no evidence that production of the ballot images White requested would compromise voter secrecy." Clark, 354 P.3d at 42. Following a show cause hearing, the court denied relief to Plaintiff. *See* CP 513-18. This appeal followed.

IV. STANDARD OF REVIEW

Under the PRA, there is a strong presumption for full access to public records. American Civil Liberties Union of Washington v. Blaine School Dist. No. 503, 86 Wn.App. 688, 693, 937 P.2d 1176 (Div. 1 1997) (there is a "presumption that there will be full access to public records."); Zink v. City of Mesa, 140 Wn.App. 328, 337, 166 P.3d 738 (Div. 3 2007) (The Act "establishes a strong presumption in favor of full disclosure of

public records."). The County bears the burden to overcome this presumption. RCW 42.56.550(1).

The PRA demands the Act be liberally construed to promote the enumerated policy of public control and transparency, and requires its exemptions be narrowly construed:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030.[5] *See also* Resident Action Council v. Seattle Housing Auth., 300 P.3d 376, 382 (2013) ("**The PRA's purpose of open government remains paramount**, and thus, the PRA directs that its **exemptions must be narrowly construed**." (emphasis added)). For emphasis, "the Legislature takes the trouble to repeat three times that exemptions under the Public Records Act should be construed narrowly."

[5] The PRA (formerly the Public Disclosure Act) was passed by popular initiative in 1972 to preserve "the most central tenets of representative government, namely the sovereignty of the people and the accountability to the people of public officials and institutions," by ensuring public access to government documents and records. Progressive Animal Welfare Soc'y v. Univ. of Washington, 125 Wn.2d 243, 251, 884 P.2d 592 (1994).

Progressive Animal Welfare Soc'y v. Univ. of Washington, 125 Wn.2d, 243, 260, 884 P.2d 592 (1994) ("PAWS II").

The language of the Act "**does not allow a court 'to imply exemptions** but only allows *specific* exemptions to stand.'" PAWS II, 125 Wn.2d at 262 (quoting Brouillet v. Cowles Pub'g Co., 114 Wn.2d 788, 800, 791 P.2d 526 (1990)) (emphasis added). Administrative code or policies may not exempt records from production either. Servais v. Port of Bellingham, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995); WAC 44-14-06002(1).[6] While a *federal* regulation may exempt records under the Supremacy Clause of the U.S. Constitution, Plaintiff is unaware of any ruling by the Washington Supreme Court holding that a state administrative regulation can exempt records from the PRA, which would be counter to the purpose and intent of the Act. *See* Ameriquest Mortgage Company v. Office of Attorney General, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (stressing that federal "[p]reemption principles apply"). "[I]n the event of a conflict between the [Public Records] Act and other statutes, the provisions of the Act govern." PAWS II, 125 Wn.2d at 262 (citing Public Disclosure Act, RCW 42.17.920); *see also* RCW 42.56.030.

[6] The reasoning behind this rule is that in order for the PRA to be effective, agencies must not be able to determine for itself which of its documents it will provide to the public and which documents will remain hidden. Servais, 127 Wn.2d at 834

Appellate review of the Superior Court's ruling is de novo. Limstrom v. Ladenburg, 136 Wn.2d 595, 612, 963 P.2d 869 (1998); Clark, 188 Wn. App. at 630; RCW 42.56.550(3).

V. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff asserts that Clark County is required to provide copies of the withheld anonymous election records that Plaintiff requested under the PRA. Agencies, including counties, must produce copies of records on request, unless one of the limited exemptions to the Act applies. None of the exemptions contained in the Act or in other statutes apply to the records at issue here—now over two years after the underlying election was tabulated and certified, and the statutory retention period expired. *See* RCW 29A.60.110.

Blocking academics, the media, and the public from analyzing anonymous election records to ferret out problems in our election system places Washington at a disadvantage and unnecessarily breeds distrust among our electorate. When other states have analyzed these same issues, they have ruled in favor of transparency and permit public access to ballot-image files and the paper ballots themselves. *See* Marks v. Koch, 284 P.3d 118 (Colo. Ct. App., 2011), *cert. denied*, Colo. No. 11SC816 (July

16, 2012); Price v. Town of Fairlee, 26 A.3d 26, 190 Vt. 66 (Vt., 2011).[7] Given the widespread use of automated computer systems in Washington that foment suspicion and the strong public policy of our state favoring production, the same result should happen here. Clark County has not met its burden and the Superior Court erred in implying exemptions for the anonymous records requested.

VI. ARGUMENT

A The Election Records are Public Records Subject to the PRA and There Is Great Public Interest in Production.

The PRA defines "public record" broadly, "regardless of physical form or characteristics," and includes the records here. RCW 42.56.010(3). "Public records" under the Act include:

> handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures,

[7] *See also*, **Michigan**—Access to Ballots Voted at an Election, Op. Mich. Att'y Gen. No. 7247 (May 13, 2010) ("Voted ballots, which are not traceable to the individual voter, are public records subject to disclosure under the Freedom of Information Act...") (Available at http://www.ag.state.mi.us/opinion/datafiles/2010s/op10324.htm);
California— Humboldt County scans all ballots for each election and posts the images online. *See* Humboldt County Election Transparency Project, http://www.humtp.com/ballots.htm;
Minnesota—copies of ballots in Franken-Coleman 2008 U.S. Senate election are posted online. MPR News, Challenged Ballots: You Be the Judge, http://minnesota.publicradio.org/features/2008/11/19_challenged_ballots/round1/. *See also* Minnesota Secretary of State, Statement of Need and Reasonableness, Proposed Permanent Rules Relating to Election (November 16, 2009), available at www.sos.state.mn.us/Modules/ShowDocument.aspx?documentid=8571 (election official is permitted "to make photocopies of the challenged ballots, because making copies...gives the public access...while still keeping the original challenged ballot secure and safe from tampering, damage or loss.").

> sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic punched cards, discs, drums, diskettes, sound recordings and any other document including existing data compilations from which information may be obtained or translated."

RCW 42.56.010(4). The Act provides this broad definition to ensure the public maintains control over the instruments it created and to protect the public interest. RCW 42.56.030. The PRA highlights the importance of government transparency and provides a safeguard against agency abuse.

Transparency is especially important in the context of elections. *See* Doe v. Reed, 561 U.S. 186, 198, 130 S. Ct. 2811 (2010) (agreeing with Washington that transparency in the electoral process is essential to the proper functioning of a democracy). A great source of public mistrust in elections is the use of computerized software systems, like the one in Clark County, that automate vote-counting and determine election outcomes.[8] This concern is reasonable considering that recently, hackers

[8] *See e.g.* Edward Tenner, Op-Ed, *The Perils of High-Tech Voting*, N.Y. TIMES, February 5, 2001, available at http://www.nytimes.com/2001/02/05/opinion/the-perils-of-high-techvoting.html ("Those in the business are all too familiar with the ways electronic systems can malfunction..."); David Dill, et al., *Electronic Voting Systems: A Report for the National Research Council* (Verified Voting Foundation), November 22, 2004, available at https://openvotingconsortium.org/files/project_evoting_vvf.pdf; Ford Fessenden, *Counting the Vote: The Machine*, N.T. TIMES, November 19, 2000, available at http://www.nytimes.com/2000/11/19/us/counting-the-vote-the-machine-new-focus-onpunch-card-system.html; Adam Cohen, Op-ed, *Rolling Down the Highway, Looking Out for Flawed Elections*, N.Y. TIMES, August 8, 2004, available at http://www.nytimes.com/2004/08/08/opinion/editorial-observer-rolling-down-thehighway-looking-out-for-flawed-elections.html.

have stolen data from the federal government,[9] the largest banks,[10] commercial websites[11] and others.[12] With millions of dollars spent on campaigns, it is only natural to believe that, given the opportunity, software vulnerabilities in election systems will eventually be exploited. These reasonable fears alone "drive[] honest citizens out of the democratic process...Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." Purcell v. Gonzalez, 549 U.S. 1, 4, 127 S. Ct. 5 (2006). Public access to the requested records can alleviate these concerns and strengthen our democracy, as Initiative 276 intended.

Washington recognizes a public interest in "preserving the integrity of the electoral process by combating fraud...and fostering government transparency and accountability." Doe v. Reed, 561 U.S. 186,

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[9] Mark Mazzetti, et al., *U.S. Fears Data Stolen by Chinese Hacker Could Identify Spies*, N.Y. TIMES, July 24, 2015, at A1, available at http://nyti.ms/1LDN7Fu.
The Court may take judicial notice of all these widely-reported events, including those cited *infra*.

[10] Matthew Goldstein, et al., *Neglected Server Provided Entry for JPMorgan Hackers*, N.Y. TIMES, December 23, 2014, at B1, available at http://nyti.ms/1CsjMcm.

[11] Danny Yadron, *Hackers Post Stolen User Data From Ashley Madison Breach*, WALL ST. J., August 19, 2015, http://on.wsj.com/1JsiUTt.

[12] Hannah Kuchler, *Cyber Insecurity, Hacking Back*, FIN. TIMES, July 27, 2015, http://on.ft.com/1Mwalxk.

197, 130 S.Ct. 2811 (2010) (citing State's argument). Indeed, as codified, it is the policy of the State of Washington that:

> ***[P]ublic confidence in government at all levels is essential and must be promoted by all possible means...[including] full access to public records so as to assure continuing public confidence of fairness of elections...***

RCW 42.17A.001(5) (emphasis added); *see also id.* at .001(11).[13]

One critical method to confirm the accuracy of the software tabulation system—and to ensure public trust in this system—is to allow the public, academics, and the press to compare the computer generated copies of the cast ballots with the final election outcome. The goal of doing so is to remove or fix faulty election hardware and software from the election system *before* it causes (intentionally or accidentally) the outcome of an election to diverge from the votes cast. Contrary to state policy, the decision under appeal eliminates meaningful public oversight of our elections through the PRA and thus undermines one of the best tools we have to prevent such election errors and/or fraud and to enhance public trust.

The Legislature maintains the desire to make elections accountable to the public with observers. *See* RCW 29A.60.170(2) (counting center must be open to observation, proceedings open to the public). The only

[13] This declaration of policy is rooted in Initiative Measure No. 276, approved November 7, 1972—the same measure through which the PRA was originally adopted.

statutory restraints on open observation relate to touching ballots or their containers, or operating the tabulation machine. *Id.* Producing digital copies of the requested anonymous records is simply the electronic-age equivalent of fulfilling the traditional openness to public observation. Public access to these records does so while respecting the enumerated proscriptions: hands-off the ballots, ballot containers and tallying equipment. Ballots have always been processed, canvassed and counted in public. *See e.g.* former RCW 29A.44, *et seq* (2005). The digital ballot images created by the Hart Intercivic voting system merely provides the opportunity to more efficiently reaffirm the power of oversight for the public.

B. The Superior Court Erred in Implying an Exemption under the PRA.

In ruling on this matter, the Superior Court completely disregarded that the PRA request at issue here was made *over a year after* the November 2013 election was tabulated and certified, and the statutory retention period for related ballots expired. CP 504-509. The court conducted no analysis and cited no specific exemption applicable to the anonymous records at issue, summarily implying an exemption from "applicable constitutional, statutory and case law," which is improper under the PRA. CP 509. The County has failed to meet its burden to

show any explicit exemptions apply to the records requested at this point in time, especially in light of Washington's strong presumption of public access to public records.

1. The Constitutional Right to Voter Secrecy Does Not Create a Categorical Exemption.

In this case, the Washington Constitution does not provide a PRA exemption. On identical facts, Division Two of the Court of Appeals unambiguously held:

> [N]othing in article VI, section 6 expressly provides that the ballot itself must remain "secret" as long as the voter who cast the ballot cannot be identified. The provision expressly guarantees secrecy of every voter, not the voters' ballots themselves...the County provided no evidence that production of the ballot images White requested would compromise voter secrecy.

Clark, 188 Wn. App. at 632.

For article VI, sec. 6 to operate as an exemption the County needed to carry its burden to identify specific responsive records which would eliminate ballot anonymity, which it did not. The County has made no assertion, or provided any evidence, that any of the records Plaintiff seeks contain any information revealing the identity of any ballot's voter. Indeed, under state law, the county is prohibited from creating or maintaining any record that permits voter-identification in the first place.

RCW 29A.08.161.[14] To be clear, Plaintiff does not seek any records that would identify how any individual voted.

The Washington Constitution does not place a general veil of secrecy over the election process, as the County claims. The election process is meant to be open and subject to public oversight as it always has been. *See* RCW 29A.60.170(2) (counting centers are open to public observation); RCW 29A.64.041 (recounts open to public observation); RCW 29A.40.130 (the record of voters who were issued ballots and who returned a ballot is public); RCW 29A.04.230 (secretary of state, as chief election officer, *shall make elections records "available to the public upon request.*" (emphasis added)). The county's claim that production would violate a broad constitutionally mandated secrecy over elections is unsupported and wrong.

Finally, even if Clark County had identified information in the requested records which would permit voter identification (which it did not), the County must still produce the images with such identifying information redacted. Resident Action Council, 300 P.3d at 379 ("the

[14] "No record may be created or maintained by a state or local governmental agency or a political organization that identifies a voter with the information marked on the voter's ballot." *See also* RCW 29A.36.111(1) (requiring ballot uniformity and that "No paper ballot or ballot card may be marked by or at the direction of an election official in any way that would permit the identification of the person who voted that ballot.")

PRA requires redaction and disclosure of public records insofar as all exempt material can be removed."); RCW 42.56.070(1). Plaintiff agrees that if there is any information on the records that would link a ballot with a voter, that information is exempt and should not be produced. But the County did not even examine the records for such exempt information. The Superior Court erred in silently excusing that conduct. CP 518.

The Secretary of State acknowledges that it displays cast ballots publically and simply "cover[s] any marks" that would reveal the voter, showing redaction here is feasible. Skagit, 188 Wn. App. at 896. By failing to examine the records and produce redacted copies (if necessary), Clark County violated the PRA.

2. Statutes Providing for Ballot Security Do Not Create an Exemption—Especially Two Years After the Election.

The County improperly relies on the ballot-security chapters of Title 29A RCW, which are designed to ensure that people do not tamper with ballots and taint an ongoing election, not to exempt scanned images and ballots from production under the PRA indefinitely.[15] The County has

[15] *See* RCW 29A.40.160(13) (ballots transported in secure containers); RCW 29A.40.110(2) (ballots stored in "secure locations"); RCW 29A.60.125 (duplicated damaged ballots kept in "secure storage"); RCW 29A.60.110 (after tabulation, ballots are sealed in containers until destruction); *see also* RCW 29A.04.611 (Secretary of State shall make rules governing "Standards and procedures *to prevent fraud and to facilitate accurate processing and canvassing of ballots*..."); CP 277 ("[i]t is the policy of the state of Washington...to protect the integrity of the electoral process by providing equal access to the process while *guarding against discrimination and fraud*." (quoting RCW 29A.04.205) (emphasis added)).

failed to meet its burden to show that those statutes contain an "explicit exemption" under the Act and the Superior Court erred in implying one.

First, any PRA exemption for the anonymous records at issue expired 60-days after ballot-tabulation—*over a year before Plaintiff made his request*. RCW 29A.60.110; CP 490-94. The timing of Plaintiff's request and the expiration of the retention period are fundamental facts that the Superior Court erroneously ignored. *See* CP 513-18. The expiration of the retention period was the primary basis for Plaintiff's "refreshed" request because there are now no statutory regulations restricting the movement of the ballots at issue. CP 16.

In the companion case, Division Two analyzed the ballot-handling regulations step by step, concluding "[t]he security of election ballots after they have been tabulated is addressed in RCW 29A.60.110...[which] is limited in scope..." Clark, 188 Wn. App. at 634-36. Division Two then found "ballots and ballot images must be kept secure at all times from receipt until at least 60 days after tabulation," *Id.* at 637. The plain language of 29A.60.110 removes the sealed retention mandate 60 days after tabulation,[16] at which time the election is over, obviating the need to keep the ballot box sealed. *See* CP 491-94. Thus, there is no applicable

[16] "or according to federal law, whichever is longer."

PRA exemption at this point in time and the County must produce the anonymous election records.

Second, Title 29A RCW explicitly exempts at least six types of documents from production under the PRA but does not do so for ballots (or digital images). *See* RCW 29A.08.710(1)),[17] RCW 29A.08.710(2),[18] RCW 29A.08.720,[19] RCW 29A.32.100,[20] and RCW 29A.56.670.[21] Title 29A RCW lacks any similarly worded exemption for ballots or ballot images. The statutory expression of all these exemptions indicates an exclusion of an exemption for ballots and ballot images. *See* Adams v. King County, 164 Wn.2d 640, 650, 192 P.3d 891 (2008) ("Omissions are deemed to be exclusions" (internal quotation marks and citation omitted)). The Legislature knows how to exempt specific records from the PRA, and even did so under Title 29A, but did not exempt ballots or ballot images.

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[17] Exempting voter registration forms.

[18] Exempting voter registration records other than those identified.

[19] Exempting the identity of the office or agency where an individual registered to vote and any record of an individual's choice not to register, including any related information. *See also* RCW 40.24.060 (exempting name and address of victim confidentiality program participant from list of registered voters available to public).

[20] Exempting the argument or statement submitted to the secretary of state for the voter's pamphlet at certain times.

[21] Exempting nominating petitions.

Finally, the general mandate to provide secure storage for certain records does not alter the PRA's strongly worded obligation for agencies to provide public access and copies. Practically all public records are stored in secure locations by law to ensure authenticity, like the records here, yet agencies must still produce them when requested under the PRA. *See, e.g.*, RCW 40.14.020(4) (The state archivist shall "**insure the maintenance and security of *all* state public records** and to establish safeguards against unauthorized removal or destruction." (emphasis added)); RCW 42.56.070. Indeed, RCW 42.56.100 requires the protection of public documents in order to facilitate public access. Similarly, the security requirements in Title 29A should be read to protect ballots for the elections and for eventual public access at the appropriate time. The court and County's suggestion that documents that must be secured are therefore eternally not subject to the PRA would remove large swaths of public records from its purview. *Id.* The county has not met its burden. RCW 42.56.550(1).

3. State Administrative Code and Policies Do Not Provide Exemptions.

Furthermore, in general, Washington Administrative Code, general state administrative policies, or declarations about state agency practices cannot provide exemptions under the PRA. "[T]he scope of exemptions is

determined exclusively by statute and case law," so the Court should disregard any Administrative Code on which the County relies. WAC 44-14-06002(1); Servais, 127 Wn.2d at 834 ("Leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization." (internal quotation marks omitted)).

Plaintiff is unaware of any ruling by the Washington Supreme Court that has ever held that a state administrative regulation can exempt records from the PRA. The Court's ruling in Ameriquest Mortgage Company v. Office of Attorney General, which recognized a *federal* regulation may exempt records under the Supremacy Clause of the U.S. Constitution, does not extend to state agency rules. 170 Wn.2d at 440. (stressing that federal "[p]reemption principles apply"). Federal regulations are fundamentally different than WACs. *See e.g.* Washington State Bar Association, Administrative Law Section, *Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws*, § 15.4(1) (2d ed. 2014) (providing treatise on PRA exemptions, without including WACs). Moreover, even if a WAC could exempt records from the PRA, none exempt the anonymous records at issue here.

C. Withholding the Records Is Not Necessary to Protect Privacy or a Vital Government Interest

Even assuming arguendo that an explicit exemption applies to the

records, the court must evaluate whether the exemptions are "unnecessary to protect any individual's right of privacy or any vital governmental function"— and if the exemptions are unnecessary, the public may access the records notwithstanding the exemption. RCW 42.56.210(2); RCW 42.56.540; Soter v. Spokane School Dist. No. 81, 162 Wn.2d 716, 757, 174 P.3d 60 (2007); Resident Action Council, 300 P.3d at 382 ("even records that are otherwise exempt may be inspected or copied if a court finds that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function." (quotation marks and citation omitted)); *see also* Soter, 162 Wn.2d at 757 (to enjoin public access to a public record, "the trial court must find that a specific exemption applies ***and*** that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital governmental interest." (italics original) (citing RCW 42.56.540). The Superior Court erred in failing to conduct this analysis. *See generally* CP 513-18.

This is a text-book case where production of the records is in the public interest to allow academics, the media, and members of the public to analyze the efficacy of the electronic tabulation systems used across our state. Further, any exemptions for anonymous records extending two years after an election is over are clearly unnecessary to protect privacy

and vital governmental interests. Making these anonymous records public will bolster public confidence in elections.

As discussed in section VI.A above, in Washington, elections are meant to be open to public observation and involvement. Making county-created digital images of cast ballots public effectuates the legislature's intent to provide public oversight. Furthermore, the exemptions claimed are unnecessary because production should pose no risk to ballot anonymity where redaction is feasible, and could not expose a two-year-old election to fraud or tampering, as discussed above. Public production would increase civic knowledge and democratic participation; increase voter confidence in the system; and guard against errors, fraud, and abuse. Record production would accomplish all these public goods without conflicting with any statutes regulating elections.[22]

And even if there were an exemption to protect a privacy right or a vital governmental function, the county must redact any exempted information and produce the rest of the records. Resident Action Council, 300 P.3d at 382 ("exemptions are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific record

[22] *See* RCW 29A.60.170(2). The public would need not touch any ballots or ballot containers and would not touch any tabulation machine.

sought." (quotation marks omitted)); *id.* at 379 ("the PRA requires redaction and disclosure of public records insofar as all exempt material can be removed."); RCW 42.56.070(1) ("To the extent required to prevent an unreasonable invasion of personal privacy interests...an agency shall delete identifying details in a manner consistent with this chapter...").

D. Plaintiff Is Entitled to Full Recovery of His Reasonable Attorney's Fees and Costs, and the Court Should Impose a Daily Penalty on Defendant.

The PRA provides for Plaintiff's recovery of fees, costs and penalties from the county as a prevailing party. RCW 42.56.550(4); Sanders v. State, 169 Wn.2d 827, 848, 240 P.3d 120 (2010). Plaintiff is entitled to fees and costs when prevailing on any claim of a PRA violation, including the Act's procedural rules. Sanders, 169 Wn.2d at 848. An award of fees is mandatory, even where an agency has acted in good faith. Amren v. City of Kalama, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). The lodestar method is the appropriate way to calculate attorney fees under the PRA. Sanders, 169 Wn.2d at 869 (citations omitted).

Plaintiff contends the Superior Court erred in denying any of the relief he requested and that the Court should award full recovery of Plaintiff's reasonable attorney fees for all work related to this case.

Plaintiff further requests an award of his reasonable fees and costs from this appeal, *See* PAWS II, 125 Wn.2d at 271 (interpreting RCW

42.56.550(4) to include appellate costs and fees), and the imposition of a daily penalty for each day the county withheld the ballot images and underlying ballots.

For the reasons identified above, Clark County has violated the PRA by improperly withholding responsive records. The court should therefore award Plaintiff White his reasonable attorney fees and costs and impose a daily penalty against the county.

VII. CONCLUSION

For the foregoing reasons, Plaintiff Timothy White respectfully requests the Court reverse the ruling of the Superior Court, order immediate production of all requested records, award recovery of Plaintiff's reasonable costs and attorney fees, and impose a daily penalty against the County for its PRA violations.

Respectfully submitted this 25th day of March, 2016

SMITH & LOWNEY PLLC

By 

Knoll Lowney, WSBA No. 23457
Marc Zemel, WSBA No. 44325

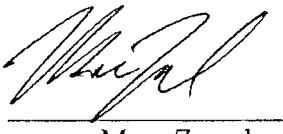
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 25, 2016, I served the foregoing to the following by e-mail:

Via
Jane Vetto
Clark County Prosecuting Attorney
Civil Division
1300 Franklin Street, Suite 380
Vancouver, WA 98666-5000
jane.vetto@clark.wa.gov

Dated this 25th day of March, 2016, at Seattle Washington.



Marc Zemel

OFFICE RECEPTIONIST, CLERK

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Subject: RE: E-filing in White v. Clark County - No. 92696-4

Received 3-25-16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: marc.zemel@gmail.com [mailto:marc.zemel@gmail.com] **On Behalf Of** Marc Zemel
Sent: Friday, March 25, 2016 3:26 PM
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Subject: E-filing in White v. Clark County - No. 92696-4

Greetings,

Attached for filing please find Petitioner's Opening Brief in the above referenced matter.

Case No. - 92696-4

Marc Zemel - WSBA No. 44325

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